

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

CARGO LOGISTICS, LLC, a  
Washington Limited Liability Company,

Plaintiff,

v.

NORTH AMERICAN TRANSPORT  
CONCEPTS, INC., a Nebraska  
Corporation,

Defendant.

CASE NO. C10-1913 RSM

ORDER GRANTING  
DEFENDANT'S MOTION TO  
DISMISS

**I. INTRODUCTION**

This matter comes before the Court on Motion to Dismiss (Dkt. #8) brought by Defendant North American Transport Concepts, Inc. ("Defendant") pursuant to Fed. R. Civ. P. 12(b)(3) for improper venue. Defendant contends its commercial relationship with Plaintiff Cargo Logistics, LLC ("Plaintiff") is governed by a written Agency Agreement ("Agreement") containing a mandatory forum selection clause, which sets venue in Tarrant County, Texas.

1 Plaintiff argues that the Agreement, and specifically the forum selection clause, was never  
2 adopted by the parties, and therefore the forum selection clause cannot be enforced.

## 3 II. BACKGROUND

4 The underlying dispute in this action arises from a breach of contract claim. Over ten  
5 years ago, a written document, referred to here as the Agreement, was created by the former  
6 owners of the two entities who are now party to this action. According to Plaintiff, the former  
7 owners ultimately did not adopt the written Agreement. Rather, the former owners reached an  
8 oral agreement under which the commercial relationship between the two enterprises would be  
9 governed. Defendant counters that the commercial relationship between the parties has always  
10 been governed by the terms of the Agreement. The Agreement itself is unsigned. However,  
11 Plaintiff's own Complaint, as well as written communication by Plaintiff, treat the Agreement as  
12 controlling of the commercial relationship between the parties.

## 13 III. DISCUSSION

14 Defendant moves to dismiss this action for improper venue pursuant to Fed. R. Civ. P.  
15 12(b)(3), arguing that venue in the Western District of Washington is improper due to the  
16 existence of a mandatory forum selection clause. *Agueta v. Banco Mexicano, S.A.*, 87 F.3d 320,  
17 324 (9<sup>th</sup> Cir. 1996). Under Rule 12(b)(3), the Court may consider facts outside the pleadings and  
18 the Court need not accept the pleadings as true. *Id.* at 324, *Murphy v. Schneider Nat'l, Inc.*, 362  
19 F.3d 1133, 1137 (9<sup>th</sup> Cir. 2003). Forum selection clauses are prima facie valid, and a court  
20 determining whether a forum selection clause is enforceable should only set aside the forum  
21 selection clause if the party challenging it can show that it is unreasonable. *Agueta*, 87 F.3d at  
22 324.

1           However, the issue before this Court is not whether the forum selection clause is  
2 reasonable, but rather whether the parties entered into a contract that included a forum selection  
3 clause. Federal law governs the interpretation and enforcement of forum selection clauses.  
4 *Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509, 513 (9th Cir.1988). State law,  
5 however, governs contract formation and the terms contained therein. *Lowden v. T-Mobile USA,*  
6 *Inc.*, 512 F.3d 1213, 1217 (9th Cir.2008). Plaintiff contends that Defendant cannot enforce the  
7 forum selection clause because Plaintiff never assented to the terms of the contract.

8           Indeed, “[f]or a contract to exist there must be mutual assent to its essential terms.”  
9 *Jacob’s Meadow Owners Ass’n v. Plateau 44 IL, LLC*, 139 Wn.App. 743, 765 (2007). In  
10 Washington, “[a] contract may be oral as well as written, and a contract may be ‘implied in fact  
11 with its existence depending on some act or conduct of the party sought to be charged.’ A trial  
12 court may deduce mutual assent from the circumstances, whereby the court infers a contract  
13 based on a course of dealings between the parties or a common understanding within a particular  
14 commercial setting.” *Hoglund v. Meeks*, 139 Wn.App. 854, 870-71 (2007) (citations omitted);  
15 See also *Jacob’s Meadow Owners Ass’n*, 139 Wn.App. at 765 (“The existence of mutual assent  
16 may be deduced from the circumstances, including the ordinary course of dealing between the  
17 parties.”) (citations omitted).

18           Plaintiff argues that the forum selection clause is unenforceable because the element of  
19 mutual assent is missing, and as such the parties never created a valid contract. In fact, the  
20 Agreement in question is unsigned. Dkt. #9, Ex. A. Moreover, the prior owners of the two  
21 companies involved in this lawsuit have both stated that the Agreement was not intended to  
22 govern the relationship between the two parties, and that they instead came to an oral agreement.  
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Dkts. #11, 12. Plaintiff thus contends that the parties never intended to be bound by the Agreement, and as such cannot be bound by its terms.

However, irrespective of the former owners’ intent at the time the Agreement was written, the inquiry into whether the Court may infer a contract is necessarily predicated on the parties’ course of dealings and common understandings which may have arisen, in this case, subsequent to the time of the writing in question. *See Hoglund*, 139 Wn.App. at 871. As discussed *supra*, mutual assent can arise from a common understanding demonstrated by the parties. *Id.* In the case before the Court, there is sufficient reason to conclude that a common understanding existed between Plaintiff and Defendant. Plaintiff’s own Complaint references the Agreement as support for its breach of contract claim, and states that “Plaintiff and Defendant were parties to an ‘Agency Agreement.’ The terms of the Agency Agreement were negotiated between the Defendant and [Plaintiff].” Dkt. #7, p.3. Moreover, Plaintiff referenced the Agreement in regular business communications. Dkt. #9, Ex. B. As such, there is sufficient evidence for the Court to conclude that a common understanding existed, in which the parties’ treated the Agreement as a contract to which they were bound. This common understanding squarely demonstrates mutual assent, and the Court will therefore infer that a contract exists between Plaintiff and Defendant. Accordingly, the forum selection clause will be enforced, and the action will be dismissed from this venue.

## IV. CONCLUSION

Having reviewed the relevant pleadings, the declarations and exhibits attached thereto, and the remainder of the record, the Court hereby finds and ORDERS:

(1) Defendant's Motion to Dismiss (Dkt. #8) is GRANTED.

1 (2) This action is DISMISSED without prejudice. The Clerk is directed to close this  
2 case.

3 Dated May 23, 2011.

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7 RICARDO S. MARTINEZ  
8 UNITED STATES DISTRICT JUDGE  
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